IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO.2643 OF 2006
in
SUIT NO. 1495 OF 1989

National Bank for Agri.& Rural Development .. Plaintiff

vs

M/s Shah Thakur & sons & anr.. Defendants

Mr.J.J.Bhat,Sr.Ad. a/w Mr.Pravin R.Diwan,Ms.Alpana Ghone i/b Kanga & Co for Plaintiff
Mr.Hansaria Sr.Adv.a/w Mr.Dasgupta i.bnDenzil D'Mello for Defendant no.1
Mr.D.G.Dhanure i.b M/s M.V.Kini & Co for Intervenor

CORAM : A.M.Khanwilkar, J

DATED : 11th October, 2007

P.C.

1. By this motion, the plaintiffs have prayed for the following reliefs :

a) that this Hon'ble Court be pleased to set aside and/or vary the order dated 11th July, 2006 passed in Notice of Motion No.1781 of 2006 and Notice of Motion No.3058 of 2005;

b) pending the hearing and final disposal of the Notice of Motion operation of order dated 11th July, 2006 be stayed;

b-1) that the respondent be restrained by an order and injunction of this Hon'ble court from withdrawing any amount whatsoever lying deposited with this Hon'ble Court to the credit of the Suit No.1495 of 1989.

c) for interim and ad interim reliefs in terms of prayer (b) and (b-1) above ;

d) for costs of this Notice of Motion; and

e) for such further and other releifs as the nature and circumstances of the case may require.

2. The background in which this motion is filed,

is that, the plaintiffs had filed a notice of Motion No.1781 of 2006 in this Court praying for a declaration that the said defendants are liable to pay interest to the plaintiff against the amount which was deposited by the plaintiff in this Court.

3. The plaintiff also filed Notice of motion No.3088 of 2005, in the pending suit for specific performance. In that motion, the plaintiff prayed for permission to withdraw the amount deposited in this Court. While the said Notice of Motions was pending, the parties filed consent minutes of the order signed by the advocates for the parties on 11th July, 2006. The same reads thus :

Consent Minutes of the Order

. The parties agree to the following interim arrangement.

1. Rs.8,74,50,000 be withdrawn by the plaintiff lying deposited with Hon'ble Court with accrued interest on Rs,17,49,00,000/- up to the date of withdrawal by the 1st Defendant of Rs.8,74,50,000 and thereafter with accrued interest on the balance sum of Rs.8,74,50,000/-.

2. Rs.2,50,00,000 be withdrawn by the plaintiff lying deposited with this Hon'ble Court.

3. Out of balance 50% principal amount (Rs.8,74,50,000) deposited by the plaintff and withdrawn by the defendant no.1 under the order of the Hon'ble Supreme Court dated 11/12/1991, the plaontiff will withdrawn Rs.5,54,50,000 (Rs.8,74,50,000/- less amount awarded by the arbitrator Rs.3,20,00,000/-)

4. Interest at the rate of 6 % p.a. on Rs.5,54,50,000/- from the date of respected withdrawal by the defendant no.1 till 31/12/2005 would remain deposited with this Hon'ble Court. This amount comes to Rs.4,33,16,611 which amount shall be invested in fixed deposited (Calculation sheet enclosed).

5. Balance amount of Rs.1,61,86,707 (Rs.11,49,53,318-(Rs.5,54,50,000 + Rs.4,33,16,611) deposited by M/s Manish Estates Pvt Ltd through Canara Bank on behalf of defendant no.1 be withdrawn back by M/s Manish Estates Pvt.Ltd.

6. Bank guarantees issued by Andhra Bank on 25/6/1992 and by Allahabad Bank on 24/2/1994 on behalf of defendant no. 1 shall get stand discharged. Prothonotary and Senior Master of this Hon'ble Court to act accordingly forthwith,.

7. The above arrangement is without prejudice to the rights and contentions of the parties in the present suit and in the arbitration appeal Lodg.No.9 of 2006 pending before Division Bench of this Hon'ble Court.

8. Prothonotary and Senior Master of this Hon'ble Court to disburse the amount as aforesaid to the respective parties within one week.

Both the NMs be listed after 4 weeks.

4. In the original Consent Minutes of Order, it is seen that at various places, corrections are carried out by hand, right from the description of the documents to insert the word "consent" preceeding the words " Minutes of the Order". Corrections so carried out have been initialled by advocates for both the sides. I am informed that the matter was called out at 11 a.m. In view of the deliberations that took place in Court, it was suggested to the parties that minutes of the order be presented by the parties after the lunch break at 3 p.m. Accordingly, document Exhibit C which is already extracted in its entirety in the earlier part of this order came to be presented by the parties titled as Consent Minutes of Order. On the basis of the said Consent Minutes of Order, the Court proceeded to pass the order on 11th July,

2006 which reads thus :

Coram: Smt Nishita Mhatre, J
Date: 11th July, 2006

1. Parties tender Consent Minutes of the Order signed by the Advocates for the Plaintiffs and Defendant No.1. Consent Terms taken on record and marked X for identification.

2. Order in terms of the Consent Minutes of the Order.

3. This order will continue pending the hearing and final disposal of the Motions.

4. Motions to be listed on 29th August, 2006.

5. Certified copy expedited.

5. The plaintiffs have now approached this Court by way of present Notice of Motion No.2643 of 2006, for setting aside the said order dated 11th July, 2006 interalia on the following assertions:

1. I say that when the said matters reached hearing on 11th July, 2006 Consent Minutes of Interim order were filed by the parties in respect of the amounts to be withdrawn by the plaintiffs and defendant no.1 and the balance to remain deposited in this Hon'ble Court. This order is without prejudice to the respective rights and contentions of the parties hereto. I say that as per the said Consent Minutes of Order there were a statement annexed which explains the entire calculations. I say that due to oversight and/or inadvertence on the part of the plaintiff's advocates, an error has crept in the said Consent Minutes of Order. I say that the Consent Minutes of Order dated 11th July, 2006 in paragraphs 3 and 4 records as follows :

3. Out of the balance 50 % principal amount (Rs.8,74,50,000/-) deposited by the plaintiff and withdrawn by defendant no.1 under the order of the Hon'ble Supreme Court dated 11/12/1991 the plaintiff will withdraw Rs.5,54,50,000/- (Rs.8,74,50,000 less amount awarded by the arbitrator Rs.3,20,00,000/-)

4. Interest at the rate of 6 % p.a. on Rs.5,54,50,000/- from the date of respected withdrawal by Defendant no. 1 till 31/12/2005 would remain deposited with this

Hon'ble Court till further orders. This amount comes to Rs.4,33,16,611 which amount shall be invested in fixed deposit (Calculation sheet enclosed).

. I say that both the Notices of Motion no.3058 of 2005 and No.1781 of 2006 are pending the hearing and final disposal. Hereto annexed and marked Exhibit B is a copy of the said Order dated 11th July, 2006.

23. I say and submit that the aforesaid mistake is on account of a genuine error in calculations and misunderstanding on the part of the plaintiff's advocates. I say that the plaintiff is entitled to as per prayer clause (d) of Notice of Motion no.3058 of 2005 to withdraw the sum of Rs.8,74,50,000/- together with interest thereon at therate of 13 % p.a. with effect from the date on which the said amount was withdrawn by defendant no.1 from the amount deposited by the plaintiffs in this Hon'ble Court till payment after deducting therefrom a sum of Rs.3,20,00,000/- together with interest thereon at 15% per annum with effect from 22nd March, 2004 till 13th April, 2004.

24. I say that as per the Consent Minutes of Order dated 11th July, 2006 the plaintiffs are entitled to interest only on Rs.5,54,00,000/- and the 1st defendant is impliedly entitled to interest on Rs.3,20,00,000/- from the date of the withdrawal by the 1st defendcant against Bank guarantee which as per the Award the learned Arbitrators have specifically rejected the claim of the1st defendant for interest pendente lite and have awarded interest to the 1st defendant only from the date of the Award i.e. 22nd March 2004.

6. The defendants on the other hand have contested this motion amongst others, on the argument that it is not the case of the planitiff that it is arithmetical or clerical mistake committed in the terms recorded in the consent minutes of order which came to be accepted by the Court on 11th July, 2006 after due deliberations. According to the defendants, the consent minutes of order as presented was reflection of the conscious

arrangement arrived at between the parties. That position is reinforced from the fact that at several places corrections have been carried out. Besides, all this was done in the presence of senior officers of the plaintiffs who were present in Court. The defendants would further contend that the consent minutes of order have been taken on record and on the basis of which an order came to be passed by this Court on 11th July, 2006, which clearly indicates that it was a self-operative arrangement arrived at between the parties. The parties were to act upon the said minutes of order in terms of clause 8 thereof within a week as the Prothonotary and Senior Master was directed to disburse the amount within one week. As soon as the amount was to be disbursed by virtue of clause 6, the bank guarantee in question furnished by the defendants were to stand discharged. According to the defendants, the plaintiffs have waited for almost over one month before taking out the present application which only indicates that it was on account of change of mind of the plaintiffs and were advised to file the present application. Moreover, the case made out in the affidavit in support of the motion is that the mistake occuring in the consent minutes of order was due to oversight and/or inadvertency on the part of the plaintiff's advocate. However, affidavit of the concerned advocate has not been filed to bring out the circumstances in which the said mistake had occured. For all these reasons, it is argued on behalf of the defendants that the

Court should be slow in showing indulgence to the plaintiff in entertaining this application for setting aside and/or varying the consent order dated 11th July, 2006.

7. Having considered the rival submissions, I am inclined to accept the stand taken on behalf of the defendants that the consent minutes of order which was tendered before this Court on 11th July, 2006 on the basis of which this Court was pursuaded to pass order, so that the parties would abide by such directions during the pendency of the cognate motion, was a product of extensive deliberations between the parties and a conscious decision taken to accept that arrangement. The defendants have specifically set out that all this was done in presence of senior officers who were present in Court. This fact has not been controverted by the plaintiffs. No rejoinder has been filed by the plaintiffs to challenge the fact so asserted by the defendants. In my opinion, it is not possible to accept the explanation now offered on affidavit by the plaintiffs so as to accede to their request for setting aside the order dated 11th July, 2006. The plaintiff will be free to pursue such other remedy as may be available in respect of the said order. However, it is not a case for recalling the consent order on the ground stated by the plaintiffs.

Hence, this Notice of motion is dismissed.

(A.M.Khanwilkar, J)